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No. 89-1399

In The

Supreme Court of the United States

October Term, 1989

International Society of Krishna Consciousness of California, et al.,

Petitioners,

v.

Robin George and Marcia George,

Respondents.

On Petition For Certiorari To The Court Of Appeal, State Of California Fourth Appellate District, Division One

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE UNITED STATES, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CENTER FOR VAISHNAVA ENLIGHTENMENT, THE CHURCH OF THE BRETHREN, THE COALITION FOR RELIGIOUS FREEDOM, THE DHARMA MEGHA/VEDANTA SOCIETY OF EAST LANSING, THE GENERAL CONFERENCE OF THE MENNONITE CHURCH, HUMAN RIGHTS ADVOCATES INTERNATIONAL, THE INDIA FOUNDATION, THE INTERNATIONAL SERVICE SOCIETY, SAIVA SIDDHANTA CHURCH, THE SOUTHERN CALIFORNIA ECUMENICAL COUNCIL, AND THE UNITARIAN UNIVERSALIST ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF GRANTING OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

For the reasons stated in the attached brief, this may be the most important single religious liberty case ever filed in this Court. The survival of a whole religious movement may be at stake.

The amici joining in this motion are Christian and Hindu religious organizations and international human rights organizations. The Christian organizations obviously do not share the beliefs and practices of Krishna Consciousness. The Hindu organizations share a common religious tradition with Krishna Consciousness, but they differ on particular points of doctrine, practice, and emphasis, in much the way that different groups of Christians differ. None of these amici approve the conduct of certain Krishna officials who attempted to deceive respondent Marcia George. But the First Amendment does not permit the destruction of an entire faith because of the misconduct of a few individuals.

These amici move for leave to file the attached brief amicus curiae because of the extraordinary importance of the case, and because they are well suited to address matters not adequately addressed in the petition for certiorari. Some of these amici are small and unpopular denominations themselves; others represent large religions in the American mainstream. The Hindu amici are in the Indian mainstream, but they are small and unfamiliar in the United States. All of these amici follow the Golden Rule in matters of religious liberty: they seek for small and unpopular faiths the same constitutional protections they seek for themselves.

The attached brief attempts to place this case in its social and legal context. The brief first reviews the history of the so-called cults, the campaign against them, and the emergence of tort suits as the principal anti-cult weapon, replacing the earlier anti-cult strategy of abduction and deprogramming.

Then the brief examines the relationship between state tort law and federal First Amendment law, and within the latter, between the Free Exercise Clause and the Free Speech Clause. Modern developments in state tort law, particularly with respect to damages, causation, vicarious liability, and torts committed without physical impact, have profound implications for First Amendment rights. Judicial deference to juries greatly aggravates the threat.

This Court has repeatedly considered the interaction between state tort law and Free Speech rights, but it has so far declined to consider the interaction between state tort law and Free Exercise rights. The Court can no longer wait for further developments in the lower courts to present the perfect case with the ideal record. The very existence of an important religious movement depends on review of *this* case.

The Free Exercise issues presented by state tort law are similar in some ways to the Free Speech issues, and petitioner ISKCON has appropriately invoked the analogy of this Court's cases protecting the commercial press. But Free Exercise cases also differ in important ways from Free Speech cases, and the attached brief explores those differences. Churches are entitled to at least the protections accorded the commercial press. But churches need additional protections that take into account the role of religious speech, the history of religious persecution, the risk that jurors may be among the persecutors, the special nature of religious property, and the certainty that any execution on temples and monasteries will vicariously punish innocent believers. Just as this Court has created special protections for unpopular political movements, it may have to create special protections for unpopular religions. *Cf. Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 449 (1958).

Finally, the attached brief offers an analysis of this case that is an alternative to the analysis offered in the Petition for

Certiorari. Both ISKCON and these amici agree that the actual malice requirement of Free Speech law must apply to this case. ISKCON suggests that in this case, the actual malice requirement is most sensibly understood as a subjective inquiry into actual motive. Amici agree that no liability should be imposed without a finding of actual desire to inflict emotional distress. But in the hands of prejudiced juries, that protection may be illusory. The attached brief argues that in the Free Speech cases, the Court has used actual malice and similar requirements to provide objective protections for speech. Religious groups are entitled to similar objective protections.

The particular statements of interests of the various amici are set forth in Appendix A (1a-5a). Amici have filed with the Clerk written consent to file this brief from counsel of record for the petitioners, from counsel of record for respondent Nico Kuyt, and from respondent Roy Christopher Richard. This motion is necessitated under Rule 37.2 because counsel of record for the respondents Marcia George and Robin George has refused consent.

For the reasons submitted in this motion and the attached brief, amici respectfully urge this Court to grant this motion and to issue the writ in this case.

Respectfully submitted,

Douglas Laycock
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BRIEF AMICUS CURIAE
QUESTIONS PRESENTED

The Questions Presented stated in the Petition for Certiorari are accurately stated. This Brief Amicus Curiae emphasizes one aspect of Petitioners' Question 3 and one additional question:

1. Whether a state may seize the major sacred properties of an entire religious faith, including temples and monasteries, to punish the wrongdoing of a few individuals.

2. Whether a state may impose tort liability on religious organizations without judicially administrable, objective standards to protect unpopular religions from hostile juries.

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INTEREST OF THE AMICI CURIAE

The amici joining in this motion are Christian and Hindu religious organizations and international human rights organizations. They do not all share the beliefs and practices of Krishna Consciousness, and they do not approve the conduct of certain Krishna officials who attempted to deceive respondent Marcia George. But the First Amendment does not permit the destruction of an entire faith because of the misconduct of a few individuals.

Because there are many amici, the particular statements of interests of the various amici are set forth in Appendix A (1a-5a).

REASONS FOR GRANTING THE WRIT

This may be the most important single religious liberty case ever filed in this Court. This case is not about a penalty on religious conduct, or even about the survival of a particular religious practice. Rather the survival of a whole religious movement may be at stake. Enforcement of the judgment below will lead to seizure of the major sacred properties of Krishna Consciousness in North America, including the temples and ashrams (monasteries) essential to the practice of the faith. Plaintiffs have even claimed the right to seize the faith's holy writings and the exclusive legal right to publish those writings.

Unless this Court intervenes, the communal practice of Krishna Consciousness faces destruction. This loss will fall on thousands of innocent believers who had nothing to do with the admitted wrongs against Marcia George. Whatever those wrongs may have been, punitive destruction of an entire religious movement cannot be a result consistent with the First Amendment. State destruction of entire religions is something that is supposed to happen in Nazi Germany, or in medieval Europe, or in small isolated countries ruled by mad dictators. It is not supposed to happen in America.

But in fact, this judgment is just the largest of many cases awarding vast sums for intangible psychological torts

allegedly committed by unpopular religious organizations. The tort system has become an instrument of religious persecution, especially in California.

This Court should grant certiorari to consider the relationship between state tort law and the free exercise of religion. Unless objective limits are imposed on state tort law, unpopular religions are threatened with destruction. This brief will suggest necessary limitations on state tort law. But first, it is necessary to place this case in context.

I. The Social Context of this Case

A. The History of Hostility to High-Demand Religions

The facts of this case, and the litigation itself, grow out of a continuing social struggle between unpopular religions and their critics. The social context of the dispute is relevant to understanding the facts of record, just as the social context of the struggle over desegregation was relevant to understanding this Court's cases involving the NAACP.

The International Society of Krishna Consciousness is one of many religious movements commonly referred to as "cults," a derogatory term applied by opponents of the faith. Observers searching for a more neutral term have described these groups as "New Religious Movements." But that is not right either, for many of these movements are not new. ISKCON is a bona fide branch of Hinduism, part of a rich religious tradition five thousand years old.

The religions that have been attacked as cults differ in many ways, but they have in common that they tend to make high demands on their adherents. The so-called cults are not religions that can be observed one hour a week on the weekend. They may require more frequent and more lengthy observances, and changes in lifestyle, diet, dress, or place of residence. The anti-cult movement has even attacked high-demand forms of Christianity and Judaism, such as fundamentalist denominations, Jehovah's Witnesses, and Orthodox and Hasidic groups. High-demand religions that spring from less

familiar traditions have been even more subject to attack and condemnation.

There is nothing unusual about the emergence of high-demand religions and hostile reactions to those religions. People naturally vary in their spiritual needs. As religions grow, become mainstream or even dominant, and appeal to large numbers of believers, they tend to become less demanding, less other-worldly, more accommodating to the secular society and the spirit of the times. They provide a range of spiritual experiences, serving the spiritual needs of millions of people. But almost inevitably, they become inadequate to satisfy the unusual spiritual needs of some of the people. Some new movement will spring up within the mainstream faiths, or some new religion will appear outside them, to meet the spiritual cravings of those no longer satisfied within them.[1]

There have been many such new religions in American history. Some have survived and become large and influential churches – the Methodists, the Baptists, the Mormons, retaining their distinctive traditions but accommodating a broad spectrum of believers. Some have survived as small faiths – the Quakers, the Jehovah's Witnesses, the Amish. Some have evolved into wholly new forms – the Unitarians and Congregationalists are descended from the Puritans. Many have disappeared – the Shakers, the Oneida, and many other nineteenth century utopian communities.[2]

In nearly every case, unfamiliar high-demand religions were greeted with hostility, often with persecution.[3] Quakers

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[1] *See generally* D. Kelley, *Why Conservative Churches Are Growing* (1972).

[2] *See* S. Ahlstrom, *A Religious History of the American People* (1972); E. Clark, *The Small Sects in America* (1937); J. Noyes, *Strange Cults and Utopias of 19th-Century America* (1966); Pattison & Ness, *New Religious Movements in Historical Perspective*, in *Cults and New Religious Movements: A Report of the American Psychiatric Association* 43, 57-60 (M. Galanter ed., 1989).

[3] Bromley & Shupe, *Public Reaction Against New Religious Movements*, in M. Galanter, *supra* note 2, at 305, 307-10.

were hung in colonial Massachusetts; Baptists in Virginia were jailed for preaching without a license.[4] America's determined effort to prevent the Jehovah's Witnesses from proselytizing led to a long series of cases in this Court. Mormons were prosecuted for their polygamous acts and persecuted for their polygamous beliefs. In a chilling precedent to this case, Congress dissolved the Mormon Church and confiscated all its property, and this Court upheld the confiscation. *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890). The reason the Mormons survived is that the dispute was focused on a single issue, and when the church changed its religious doctrine, Congress returned its property.

Governmental hostility to unpopular religions grew out of societal hostility. The long history of new religions is matched by an equally long history of hate literature. Most of this literature is of course protected by the First Amendment. But private attacks on unpopular religions have also repeatedly spilled over into violence, even in this country. At various times in our history, Catholics, Mormons, and Jehovah's Witnesses were the victims of mob violence.[5]

B. Violence Against Hare Krishnas – Deprogramming

The events at issue in this case occurred during an unusual outbreak of anti-religious violence, the deprogramming movement. Deprogramming was one part of a larger anti-cult movement, carefully and objectively described by two social scientists.[6]

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[4] D. Boorstin, *The Americans: The Colonial Experience* 35-40, 136 (1958).

[5] *See* Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 416-20 (1986); P. Irons, *The Courage of Their Convictions* 22-35 (1988).

[6] See A. Shupe & D. Bromley, *The New Vigilantes: Deprogrammers, Anti-Cultists, and the New Religions* (1980).

The anti-cult movement was partly an outgrowth of ideological hostility to high-demand religions, and partly an outgrowth of the genuine anguish felt by parents of young people who joined these religions. It is undoubtedly distressing to have a late-adolescent or young-adult son or daughter reject your beliefs and lifestyle and enter a Krishna ashram. But this emotional distress is not legally cognizable, because it is an inevitable consequence of the First Amendment right to religious conversion.

Again we note that there is nothing new about this distress. Pharisee parents were similarly distressed two thousand years ago, when some of their children began following an itinerant preacher from Nazareth. Some parents feel distress when their child converts from Protestantism to Catholicism, or from Presbyterianism to Pentecostalism. Conversion of middle-class Americans to high-demand Asian religions has often been a startling change, triggering especially intense parental reactions.

Yet we should not be surprised that some small percentage of young Americans make such conversions. In a secularized and materialistic society, in which many families treat religion as a minor part of their lives and many others provide no religious instruction at all, it is inevitable that some young people will find their parents' lifestyle spiritually empty. Some of these young people experiment with high-demand religions. Responsible scholars have found that most of the young people joining these groups – like Robin George – "were unusually affected by the decline in traditional religious and political meanings," and that many of them – like Robin – had experimented with more than one religion before committing to a particular high-demand faith.[7] Some of these

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[7] Anthony, *The Fact Pattern Behind the Deprogramming Controversy: An Analysis and an Alternative*, 9 N.Y.U. Rev. L. & Soc. Change 73, 85-86 (1980). For similar findings, see Levine, *Life in the Cults*, in M. Galanter, *supra* note 2, at 95, 101; Stark & Lofland, *Becoming a World-Saver: A Theory of Conversion to a Deviant Perspective*, 30 Am. Soc. Rev. 862 (1965).

young people became long-term members of their new religion, but most left voluntarily within a short time.[8]

Beginning in the 1970s, many parents responded to the initial conversion with "deprogramming." The essence of deprogramming was to physically abduct the convert, isolate him and physically restrain him, and barrage him with continuous arguments and attacks against his new religion, threatening to hold him forever until he agreed to leave it. A Methodist minister has called it "protracted spiritual gangrape."[9] Deprogrammings have been described by social scientists,[10] judges,[11] attorneys,[12] and deprogrammers,[13] all of whom give quite similar accounts. Some victims of deprogramming returned to their religious group at the first opportunity; some abandoned the group.

The best known deprogrammer, Ted Patrick, testified that he had participated in 1300 deprogrammings in seven years.[14] Especially in the early years, religions victimized by deprogramming found that they could not rely on law-enforcement officials or even the courts for protection.

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[8] A. Shupe & D. Bromley, *supra* note 6, at 145-46; Richardson, *The Psychology of Induction: A Review and Interpretation*, in M. Galanter, *supra* note 2, at 211, 225-26, 231-32; Levine, *supra* note 7, at 105-06; Judah, *Programming and Deprogramming*, cited in Anthony, *supra* note 7, at 86 n.106.

[9] Kelley, *Deprogramming and Religious Liberty*, Civil Liberties Review 23 (July/Aug. 1977).

[10] A. Shupe & D. Bromley, *supra* note 6, at 121-67.

[11] *Gilmartin v. Taylor*, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983).

[12] LeMoult, *Deprogramming Members of Religious Sects*, 46 Fordham L. Rev. 599, 603-08 (1978).

[13] T. Patrick, *Let Our Children Go* (1976) (extensively quoted in LeMoult, *supra* note 12).

[14] Deposition of Theodore Patrick in *Helander v. Patrick*, (Conn. Sup'r Ct. of Fairfield County, No. CONN NL. 159062).

Police refused to investigate, or even assisted the deprogrammers; prosecutors refused to prosecute; juries refused to convict.[15] Some judges accepted conversion as evidence of incompetence, appointed conservators of the convert, and ordered the "incompetent" delivered to his conservator for deprogramming. This practice was eventually rejected in *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

In one extraordinary case, in which a Hare Krishna devotee filed a criminal complaint against her deprogrammers, the grand jury refused to indict the deprogrammers but did indict ISKCON. A judge eventually dismissed the indictment, finding undisputed evidence that the deprogrammers had kidnapped the victim and physically held her for four days, and accepting the prosecutor's concession that she had joined ISKCON voluntarily and had been free to leave at any time. *People v. Murphy*, 98 Misc. 2d 235, 413 N.Y.S.2d 540 (Sup. 1977).

The events now before the Court occurred from 1974 to 1976, when the deprogramming movement was at its height and before the judiciary offered any protection to the threatened religions. The existence of the deprogramming movement does not excuse the misconduct of certain Krishna officials in this case. But this background is essential if the Court wishes to understand why these officials acted as they did. An organized movement was abducting Krishna devotees and holding them prisoner. The law had failed to provide protection; self-help was the only defense. All the rest of this case grows out of that historical fact.

In some ways the facts of this case are unusual. But in one important way they are entirely typical. There is not a shred of evidence that ISKCON ever physically restrained Robin or held her against her will. Pet. App. 25a n.16, 36a n.23. But there is ample evidence that Robin's parents resorted to violence and physical restraint. Her father brought her home from New Orleans against her will, he slapped her,

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[15] A. Shupe & D. Bromley, *supra* note 6, at 133-34.

he sprayed her with a hose and knocked her down. Her parents burned her copy of the scriptures and chained her to the toilet. *See* Pet. App. 10a-11a, 25a n.17, RT 962. This pattern appears in nearly all the reported cases. Parents and deprogrammers regularly resorted to physical force and physical restraint; it was rarely even alleged that the religious groups had done so.

The deprogrammers and their defenders do not dispute this account of deprogramming.[16] They claim only that their conduct was justified, because the converts have been "brainwashed", "programmed," "thought reformed," or subjected to "coercive persuasion," by their new religions. There are more than five hundred pages of testimony to that effect in this case. 27 RT 5113 to 28 RT 5527, 31 RT 5871-6002. The star witness, Dr. Margaret Singer, has testified in many cases, always finding that converts were brainwashed. She has also testified that criminal defendants were brainwashed into committing their crimes, and even that corporate franchisees succumbed to "coercive persuasion" in their business dealings.

Dr. Singer's theories have no support in empirical research and little acceptance in the scientific community. At least two federal courts have recently held her testimony inadmissible for failure to show scientific acceptance. *Kropinski v. World Plan Executive Council – US*, 853 F.2d 948, 956-57 (D.C. Cir. 1988); *United States v. Fishman*, No. CR-88-0616-DLJ, 1990 W.L. – (N.D. Cal., Apr. 13, 1990). Dr. Singer's theories and testimony have been carefully analyzed and thoroughly discredited.[17] Her theories are a modern version of "religious insanity," a theory so commonly used

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[16] *See* T. Patrick, *supra* note 13.

[17] Anthony, *Religious Movements and Brainwashing Litigation: Evaluating Key Testimony*, in *In Gods We Trust: New Patterns of Religious Pluralism in America* 295 (T. Robbins & D. Anthony, eds., 2d ed. 1990). *See also* Richardson, *supra* note 8, at 216; Taylor, *Thought Reform and the Unification Church*, in *The Brainwashing/Deprogramming Controversy* 73 (D. Bromley, ed., 1983); sources collected in T. Robbins, *Civil Liberties, Brainwashing and Cults: A Select Annotated Bibliography* (1979).

against earlier high-demand religions that it became one of the most common diagnoses in nineteenth-century psychiatry.[18]

To equate dramatic religious conversions with brainwashing is to declare war on the free exercise of religion. The California courts have properly rejected the brainwashing theory as a basis for false imprisonment claims. *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1123-24, 762 P.2d 46, 63-64 (1988), *cert. denied*, 109 S. Ct. 2110 (1989). But they have allowed juries to consider it as a basis for fraud and intentional infliction of emotional distress, *id.* at 1108-10, 762 P.2d at 53-56, and the jury's apparent acceptance of the brainwashing evidence fatally taints the verdict in this case.

C. Torts Suits As An Instrument Of Persecution

In the 1980s the anti-cult movement has emphasized a new tactic, far more powerful than deprogramming. This tactic is the tort suit. Deprogramming attacked the unpopular religions retail, one convert at a time. The tort suit attacks them wholesale, millions of dollars at a time. Every tort suit is a threat to the very existence of the religious organization. Even if a religion manages to avert destruction by a single multi-million dollar judgment, it faces destruction over time by litigation costs and a series of smaller judgments.

Tort liability against religious organizations is vicarious in the extreme. The loss falls on innocent believers who had nothing to do with the wrong, no opportunity to profit from the wrong, and little or no opportunity to supervise or prevent the wrong.[19]

This Court first saw the tort suit as a weapon of destruction when public officials in Alabama sought to destroy the Southern Christian Leadership Conference with a series of defamation suits. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Today, a movement of private citizens is using

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[18] *See* Pattison & Ness, *supra* note 2, at 75-76.

[19] *See generally* E. Gaffney & P. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* (1984).

tort suits to destroy high-demand religions, and this Court must once again respond.

The typical plaintiff in a religious tort suit is a disgruntled former member of the defendant religion, sometimes joined by relatives. All churches lose members, and high-demand religions in a culture generally committed to low-demand religion lose more members than other religions lose. Some members leave voluntarily, a decision fully protected by the First Amendment. Some are "successfully" deprogrammed; some, like Robin George, are removed from the religion involuntarily without being deprogrammed.

Many who leave do so without animus or ill-will toward their former faith. But some do not merely leave. Some join anti-cult organizations and become zealous opponents of their former religions. Those who leave involuntarily, through deprogramming, are less likely to understand why they entered and more likely to become bitter opponents of their former faith.[20] Dr. Singer's "research" is based almost exclusively on victims of deprogramming who were sufficiently disturbed to seek psychotherapy.[21] She attributes the problems of these patients to their religious experience rather than to their deprogramming experience, and she bases her general claims about all members on this small and unrepresentative sample. But with or without deprogramming, every major religion has ex-members among its most vigorous critics. The proverbial "zeal of a convert" applies to conversion out of a faith as well as to conversion into a faith. It is these zealously unhappy ex-members who become tort plaintiffs.

The tort most frequently alleged is intentional infliction of emotional distress. Other common allegations include invasion of privacy, fraud and misrepresentation, and false imprisonment based on claims of brainwashing – all torts without physical impact. The alleged wrongdoing typically

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[20] A. Shupe & D. Bromley, *supra* note 6, at 150-53; Anthony, *supra* note 7, at 86; Galanter, *Cults and New Religious Movements*, in M. Galanter, *supra* note 2, at 30.

[21] Richardson, *supra* note 8, at 228-31.

consists of a communication, sometimes a communication about religious belief. The alleged harm is typically psychological or emotional; the alleged causal connection between wrongdoing and harm is typically attenuated and unverifiable. Most of the sums claimed are punitive damages and allegedly compensatory damages for emotional distress, neither of which is measurable by any objective standard.

From beginning to end, these cases consist of subjective and intangible elements. Even with careful and unbiased effort, it is difficult to separate the actionable wrongdoing, where there is any, from protected religious exercise. These cases provide maximum opportunity for juries to act on their prejudices, and minimum opportunity for judges to control juries. The resulting verdicts have been staggering: $32 million in this case, $39 million[22] and $30 million[23] in other cases. Even after most of such a verdict is remitted, the resulting judgment is devastating.[24]

There is ample evidence that these verdicts reflect juror-hostility to high-demand religions. The enormous verdicts against religious groups for non-physical torts contrast sharply with the nominal or non-existent verdicts against deprogrammers for physical abductions and imprisonments. One jury awarded $5,000 for a physical false imprisonment.[25] In a case where a victim of deprogramming reacted hysterically and spent much of the first two days curled in fetal position, crying, with her fingers in her ears, a jury awarded $1

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[22] *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, *review denied*, 293 Or. 456, 650 P. 2d 928 (1982), *cert. denied*, 459 U.S. 1206 (1983). The verdict after remand is reported in 5 Religious Freedom Rptr. 126 (Or. Cir. Ct. Multonomah County 1985).

[23] *Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Cal. App. 1989), cert. pending, No. 89-1361.

[24] See examples in Pet. at 12 n.10.

[25] *Helander v. Patrick*, (Conn. Super. 1976, reported in LeMoult, *supra* note 12, at 636 n.290).

compensatory damages and $4,000 and $6,000 punitive damages, severally, against two deprogrammers.[26]

Jurors are a cross-section of the public, and juror hostility reflects the hostility in public opinion. Substantial majorities of the American people believe "the FBI should keep a close watch on new religious cults," that "there should be laws to prevent groups like the Hare Krishnas from asking people for money at airports," and that it should be against the law for "unusual religious cults to try to convert teenagers."[27] This Court has encountered once before a deliberate legislative effort to "get the Moonies" and similar unpopular religions. *Larson v. Valente*, 456 U.S. 228 (1982). But the discriminatory legislation struck down in *Larson* had far less destructive power than a series of jury verdicts.

The power to award punitive damages is the power to destroy. Even the power to award damages for emotional distress is the power to destroy. Until this Court imposes judicially administrable, objective limits on the power of juries, unpopular religious organizations will not be secure even in their right to exist.

II. FIRST AMENDMENT LIMITS ON STATE TORT LAW

State tort law and federal First Amendment law are two distinct systems, serving very different functions and operating on very different presuppositions. Modern tort law is designed to compensate widely and generously; it is predisposed to impose liability. First Amendment law is designed to protect controversial beliefs, speech, and religious practices; it is predisposed to avoid liability. These differences are reflected in issues of liability, causation, jury control, damages, and exemptions. Tort questions are generally left to

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[26] *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

[27] *The Williamsburg Charter Survey on Religion and Public Life*, 7 J.L. & Religion – (forthcoming 1990). A copy of this document has been served on the parties and lodged with the Librarian of this Court.

state law, but when the two systems interact, federal law must control. State tort law has become the principal instrument of religious persecution in America, and unpopular religious bodies desperately need protection that only this Court can authoritatively provide.

A. The Standard For Liability

The commercial press cannot be subjected to liability for defamation of a public figure without a showing of actual malice. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The same rule applies to invasion of privacy, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and to intentional infliction of emotional distress, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

At the very least, religious organizations are entitled to the same protection. See Pet. 12-16. But important differences between religious organizations and the commercial press require broader protection for religion. Most obviously, protection for religious organizations should not depend on the presence of a public figure. The public figure requirement in the commercial press cases serves a function that does not apply to religious speech and practice.

The requirement that the plaintiff be a public figure ensures that speech protected by the actual malice rule is central to the purpose of the First Amendment. The Free Speech Clause applies to all communicative activity, but the Court has always recognized that not all speech is equally central to the First Amendment. Criticism of public figures is essential to self-government, and thus central to the First Amendment. Criticism of private figures is much less likely to be essential to self-government.

We know that all religious speech is central to the First Amendment, because it is singled out for special protection in the Free Exercise Clause. Most religious speech is private, within religious communities. It is protected not because of its occasional role in self-government, but because religious liberty is inherently of transcendent importance. Thus, the actual malice requirement should extend to all religious

speech and practice; the public figure requirement of the media cases is irrelevant.

ISKCON has suggested that the actual malice requirement on these facts means an affirmative desire to inflict emotional harm for its own sake, as distinguished from knowledge that emotional harm will result from bona fide religious practice. Pet. at 12-16. Certainly that would be a better rule than the rule embodied in the jury instructions below. But it is not sufficient. A jury willing to award $32 million against a small religious body is a jury out of control. Not all such juries will be deterred by instructions about subjective motive.

This Court has recognized that jury determinations of subjective motive pose too great a threat to protected speech. *Hustler*, 485 U.S. at 53; *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). Indeed, it seemed clear in *Hustler* that the parody was printed for the actual purpose of inflicting emotional distress, and that any other motive was secondary. Yet this Court held that actual malice could not be shown, because there was no false statement of fact. The requirement of a false statement of fact served as an objective threshold for liability.

The Court took a similar approach in a different context in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Non-violent boycotts and political association were protected; specific acts of violence were unprotected. Although the point was not emphasized, the Court's test set up an objective threshold for liability and precluded jury inquiry into motive.

A similar approach is required in tort suits against religious organizations. Once a defendant shows that it is a bona fide religious organization, generally engaged in religious activity, the jury should not be allowed to impose tort liability based on its assessment of the motives for particular conduct. Rather, liability should be limited to conduct that crosses over one or more judicially administrable objective thresholds. The motive elements of the actual malice test should be applied *after* plaintiff has shown such objectively wrongful conduct.

Physical impact is one such objective threshold. Religious organizations should be liable for violence, including

battery and false imprisonment imposed by physical restraints, and for negligence torts with physical impact, such as slip-and-fall cases, automobile accidents, and medical malpractice in religious hospitals. This case presents no issue of liability for physical impact, and no claim of general charitable immunity.

False statements of verifiable fact about temporal matters is another objective threshold. Liability in this case can be based on deliberate misstatements about Robin's physical location. But it cannot be based on accepting Robin as a devotee, on religious instruction to Robin or other devotees, on emphatic disapproval of Robin's parents, or on other statements of religious belief to Robin, her parents, or the public.

Verbal harassment of persons who have made clear their unwillingness to listen to the speaker's message might be another objective threshold. This Court has vigorously protected the right to proselytize, but it has also protected the right of the audience to say no. No such issue is presented in this case, because the Court of Appeal found it clear that Robin George approached ISKCON first and at all times participated voluntarily, and there was no proselytization of Marcia George.

This Court has rejected the claim that statements of religious belief can be fraud. *United States v. Ballard*, 322 U.S. 787 (1944). For similar reasons, such statements cannot support liability for intentional infliction of emotional distress. Religious teaching often inflicts emotional distress. A minister confronting a parishioner with his sins, a prophet calling a society to account, or a sermon on the risk of eternal damnation, will foreseeably and sometimes intentionally inflict emotional distress. Emotional distress is often the prelude to religious conversion, and emotional distress among the convert's friends and family is often an unavoidable consequence. The jury instruction in this case, Pet. at 12, would authorize liability in all these cases.

B. Causation

State tort law defers to juries, and allows jurors to draw attenuated inferences of causation. In this case, for example, the jury attributed Jim George's death from a second heart attack to the Hare Krishnas, even though his heart disease had sharply limited his life expectancy before Robin ever met the Hare Krishnas. Pet. App. 66a. The Court of Appeal affirmed, holding that it had no power to review the jury's determination on the issue. *Id.* at 65a.

In cases not subject to the First Amendment, such free-wheeling notions of cause are a matter of state policy. State policy often attributes loss to commercial firms who can spread the loss through the prices of their products or through insurance.

Whatever the merits of this approach to causation, it makes no sense when applied to the mistakes of religious organizations protected by the First Amendment. Expansive notions of cause allow juries to attribute the effects of protected religious conduct to unprotected torts, and thus to evade the First Amendment's protection for the religious conduct. Such verdicts impose costs on vulnerable defendants who cannot spread the loss.

This Court recognized this problem in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The Court rejected the trial court's expansive findings on causation, and it required that damage liability be individualized and "tailored to the consequences" of the violent conduct. *Id.* at 926. *See also Carey v. Piphus*, 435 U.S. 247, 263 (1976), emphasizing the "ambiguity in causation" of emotional distress where a justified penalty was imposed after a constitutionally inadequate hearing. In tort suits against religious bodies, causation is an issue of constitutional significance. By concluding that the jury punished only unprotected activity, the Court of Appeal eviscerated this Court's mandate in *Claiborne Hardware*, and it embraced an unbounded theory of causation. See Pet. 17-24.

C. Control of Juries

Juries are a majoritarian institution; they cannot be relied on to protect the rights of unpopular minorities. This Court has therefore recognized the need to control juries in First Amendment cases. In the commercial press cases, actual malice must be proved by clear and convincing evidence, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), and judges must apply the same standard to motions for summary judgment. *Anderson v. Liberty Lobby, Inc*, 477 U.S. 22 (1986). Critical findings of fact are subject to independent review in this Court. *Bose v. Consumers' Union*, 466 U.S. 485 (1984).

Given the evidence of rampant jury prejudice in this and other cases, these safeguards are essential to the rights of unpopular religions. But the traditions of state tort law are quite different, because in most contexts, state tort law serves quite different interests. Juries are instructed to make findings on a preponderance of the evidence, and review of their findings is limited to highly deferential standards. This deference to juries is unacceptable in Free Speech cases, and it is equally unacceptable in Free Exercise cases.

D. Damages

Whatever the standards of liability, causation, burden of proof, and judicial review, the ultimate problem is the standardless award of damages. This Court has recognized the First Amendment threat arising from the "largely uncontrolled discretion of juries to award damages where there is no loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Equally dangerous is the largely uncontrolled discretion of juries to award large damages where there is a small loss. Punitive damages present the first danger; damages for emotional distress present the second. Both are inherently standardless, not subject to any monetary measure. In the hands of a hostile jury, either is a devastating threat to a small and unpopular religion.

There is growing scholarly recognition in the Free Speech cases that controlling damages is more important than limiting liability to actual malice.[28] This Court must address the problem of damages, especially punitive damages and damages for emotional distress.

Religious organizations should be immune from vicarious liability for punitive damages. This Court has already created such immunity for labor unions, *Electrical Workers v. Foust*, 442 U.S. 42 (1979), and municipalities, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). These decisions were nominally in the name of statutory construction, but in fact the relevant statutes were silent on the subject. The Court construed the statutes as it did because of a policy judgment that punitive damages would unfairly punish innocent union members and taxpayers. That judgment is equally applicable to innocent worshipers in this case, who will forfeit their constitutional right to exercise their religion.

This Court has recently granted certiorari to consider the constitutionality of standardless awards of punitive damages against a commercial insurance company. *Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279 (April 2, 1990). The award in that case was slightly over a million dollars, it did not threaten the defendant's existence, and the defendant was not entitled to any special constitutional protections beyond the general protections of the due process clause. After that grant of certiorari, this case is a fortiori deserving of review.

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[28] *See* Anderson, *Reputation, Compensation, and Proof*, 25 Wm. & Mary L. Rev. 747, 756-64 (1984) (urging restrictions on recovery for emotional distress); *see also* R. Bezanson, G. Cranberg, & J. Soloski, *Libel Law and the Press* 222 (1987) (concluding from extensive empirical study that it is damage liability that requires privileges such as the actual malice rule, and that these privileges require intrusive inquiry into defendant's editorial process and mental state, but that they do not eliminate chilling effect on expression); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 Cal. L. Rev. 809 (1986); Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772 (1985).

Compensatory damages for emotional distress are harder to control than punitive damages, and an absolute immunity would undervalue the interests of tort victims who do indeed suffer emotional distress. But this Court can impose on trial and appellate judges a special duty to closely scrutinize emotional distress damages in First Amendment cases, a duty to hold those damages to manageable levels consistent with the necessary "breathing space" for First Amendment activity. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

E. Exemptions

Another possible solution to the problem of excessive damages is a constitutionally-based exemption from execution on the sacred properties essential to religious observance. See Pet. 24-26. Such an exemption might be conditioned on the maintenance of reasonable liability insurance for insurable torts involving physical impact. But insurance is not available for claims of emotional distress against unpopular religions.

Again municipalities present an instructive analogy. Municipalities are not immune from damage liability, but the property essential to urban government has long been exempt from execution. *Meriwether v. Garrett*, 102 U.S. (12 Otto) 472, 501 (1880). Churches should be liable for their real torts, but innocent worshipers should not lose their places of worship as a consequence. Another instructive analogy is the homestead exemption, which serves a policy equally applicable to the monasteries at risk of seizure here.

CONCLUSION

For the reasons stated, amici respectfully urge this Court to grant certiorari. The Court can no longer wait for further developments in the lower courts to present the perfect case with the ideal record. The very existence of an important religious movement depends on review of *this* case.

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APPENDIX A: STATEMENT OF INTERESTS OF INDIVIDUAL AMICI

The National Council of the Churches of Christ in the USA (NCC) is a community of thirty-two national religious communions having over 42,000,000 members in the United States. These communions – through their representatives on the Governing Board of the NCC – support the right of religious bodies to share their message with others. That right is not limited to the major religious bodies that make up the "mainstream" of American religious life, but includes all religious groupings. As the governing body of the NCC said as long ago as 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities." Policy Statement: RELIGIOUS AND CIVIL LIBERTIES IN THE USA, October 5, 1955.

The Catholic League for Religious and Civil Rights (League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination, and to defend the rights and sanctity of each human life. The league supports the right of parents to direct the upbringing of their children and works to protect the integrity of the family. Although the League does not agree with the theology of ISKCON and does not condone deception by Church officials, the League is concerned with the grave threat to the religious freedom rights of all religious groups that is posed by the decision of the California Court of Appeal.

The Center for Vaishnava Enlightenment (Center) is a Hindu organization formed to serve the Hindus of North America. The Center devotes particular emphasis to the Vaishnava sect, but is not limited to any particular subgroup among the Vaishnavas. Center activities include research in Vaishnavism and the practice of Vaishnava philosophy in day to day living.

The Church of the Brethren is a Christian body of some 155,000 members in the United States, having historical and ecumenical ties throughout the world. The church began in Germany in 1708; but within a few years, for reasons of religious freedom, it migrated to the United States. The Church of the Brethren has taken positions that are unpopular in the larger community. Conscientious objection to military service is a primary example. Although the Church of the Brethren does not adhere to or support all the beliefs of ISKCON, we are concerned that religious groups can be terminated by the imposition of punitive damages on the basis of beliefs that are generally unpopular. For the courts to move in that direction weakens the First Amendment protection of religious freedom, which is a foundational freedom under the Constitution. For these reasons, the Church of the Brethren urges this Court to set appropriate standards for the imposition of punitive damages on religious bodies.

The Coalition for Religious Freedom (CRF) is a non-profit, tax-exempt educational organization incorporated in the District of Columbia in 1984. Originally begun as a coalition of evangelical and independent Christian Churches, CRF now includes Americans of all faiths. In addition to its research and education about church-state issues in the United States, the Coalition offers advice and mediation to persons involved in disputes over religious liberty issues. CRF has a vital interest both in the standards under which courts may impose tort liability for religiously motivated acts, and in the safeguards that protect parties to a civil action from improper appeals to the religious prejudice of jurors.

The Dharma Megha/Vedanta Society of East Lansing has been active in promoting Hindu Vedantic philosophy in Michigan since 1981. The Society sponsors regular religious discourse for the benefit of students and faculty members at Michigan State University and for others in the Greater Lansing area.

The General Conference of the Mennonite Church traces its spiritual heritage to the Anabaptists of sixteenth century Europe, who experienced persecution, exile, and murder at the hands of both the state and the state-churches because they sought to practice adult baptism, to maintain churches free from the control of the state and its state-churches, to engage in evangelism, and to practice biblical Christian pacifism by refusing to bear arms. As the victims of religious persecution, Mennonites especially appreciate the religious freedoms and protections of the American Constitution. As a Christian church, Mennonites do not share the tenets of the Hare Krishna religious organization, but seek to defend for them the same First Amendment freedoms we claim for ourselves.

Human Rights Advocates International, Inc., (HRAI) is a voluntary nonprofit membership organization dedicated to securing the legal protection of human rights throughout the world. Recognized as a Non Governmental Organization by the United Nations, HRAI emphasizes constitutionalism, and its members work on constitutional development throughout the world. There has likewise been much emphasis on questions relating to freedom of religion.

The India Foundation was founded in 1970 to serve the religious and humanitarian interests of the Indian community settled in the United States, as well as to promote better understanding between people of the United States and India. That understanding was undermined by the previous proceedings in this case.

The International Service Society is a nonprofit charitable organization interested in promoting world peace and social justice through self transformation. The Society promotes dialogue and activities throughout the United States to promote these goals.

Saiva Siddhanta Church was founded in 1949 by His Holiness, Gurudeva, Sivaya Subramuniyaswami. Its spiritual heritage derives from the Saivite Hindu traditions of South India and northern Sri Lanka. SSC is dedicated to nurturing its membership and local Church bodies in eight countries and to serving, through its publications, the broader community of Hindus throughout the world. The Church has its headquarters on Kauai, Hawaii, USA, where ordained sannyasins (Hindu renunciate monastics) are trained. The Church also owns and operates monasteries and Siva temples in Concord, California, on the island of Kauai in Hawaii, and in Malaysia, Mauritius and Sri Lanka. The Church oversees 25 missions worldwide, publishes books on Hindu scripture and philosophy, and provides resources and support for non-affiliated Hindu institutions and ministries. SSC does not condone those actions of ISKCON in this case – such as concealing a minor child from her parents – which are not in accord with Hindu ethics or the Hindu principle of *ahimsa* (noninjury by thought, word or deed). However, the extremely high and unwarranted punitive damages in this case will deprive America's 500,000 Hindus of two or more temples, which are already too few and which are a central focus of Hindu spirituality. We believe this judgment imposes an oppressive burden on the broad Hindu community's future free exercise of religious freedom. We also feel that this Court alone can redress the pervasive bias against minority religions which we witness almost daily among our brothers and sisters who are Hindus, Buddhists, Jains, and Sikhs.

The Southern California Ecumenical Council (Council) represents more than 16 Protestant, Anglican, and Orthodox Christian communities organized to promote Christian unity by working together through program units and by witnessing to a common faith and ethic. The Council joins this brief out of urgent concern over the danger of excessive governmental intervention in religious affairs and out of a desire to defend the free exercise of religion. The Council see court imposition of civil and punitive damages against religious groups for the

exercise of constitutionally protected activity as a direct threat to each of its thousands of congregations.

The Unitarian Universalist Association is a voluntary religious association of 1,000 congregations in the United States. The Association frequently intervenes in cases where important First Amendment rights are at stake. This case in particular poses a serious threat to the free exercise right guaranteed to churches under the First Amendment.